Not designated for publication

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-872

J. SKY TAPP APPELLANT V. LANCE LANDERS APPELLEE	**Opinion Delivered** April 15, 2009 APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT, [NO. CV2006-157-2] HONORABLE JOHN NORMAN HARKEY, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant J. Sky Tapp appeals a judgment entered by the Circuit Court of Independence County in favor of appellee Lance Landers. For reversal, appellant argues that he did not receive notice of the trial date and that the trial court erred by not granting his motion to set aside the alleged default judgment. We find no error and affirm.

On July 6, 2006, appellee filed suit against appellant and Darron Dusek alleging that he leased a car lot and shop building to appellant and Dusek and that they failed to pay the rent and utility bills as required by the lease. Appellee obtained service of process on appellant, who filed a timely answer to the complaint through his attorney, Joseph Churchwell.[1] In a letter dated January 8, 2008, appellee's attorney notified Churchwell that

[1] Appellee did not obtain service upon Mr. Dusek, and the trial court dismissed appellee's claims against him without prejudice for want of service.

he was requesting a setting on the court's docket for a non-jury trial on March 31, 2008. On January 25, 2008, Churchwell filed a motion to withdraw as appellant's counsel, and the trial court granted that motion on February 4, 2008. On February 8, 2008, Churchwell sent a letter to appellant advising him of the withdrawal, but it does not appear that Churchwell provided appellee's attorney with copies of the motion or order.

On March 18, 2008, appellee's attorney sent a certified letter to Churchwell confirming the trial date of March 31, 2008. Churchwell subsequently sent a fax to appellee's attorney advising that he was no longer appellant's attorney of record. Neither Churchwell nor appellee's attorney notified appellant of the trial date. It also does not appear that Churchwell tendered the case file to appellant, nor did appellant, a practicing attorney, retrieve the file from Churchwell upon his withdrawal.

On March 31, 2008, appellant did not appear for trial, and appellee moved for a default judgment. The trial court granted the motion but also heard testimony on appellee's claim. Appellee testified that he entered into the lease with appellant and Dusek in January 2004 and that he leased the premises to them for an eighteen-month period ending on July 15, 2005. He said that the lease required rental payments of $2,200 per month, in addition to the payment of utilities. Appellee testified that only two rental payments were made during the course of the eighteen-month lease and that appellant made one payment after appellee traveled to Hot Springs and prevailed upon appellant to pay the rent. Appellee further testified that he paid $587.73 in utility bills during the term of the lease. Appellee introduced

into evidence the lease, the utility bills, and his cancelled checks showing payment of those bills.

Dawn Reed, a forensic document examiner, testified that she compared the purported signature of appellant on the lease with known samples of appellant's signature taken from court documents. She opined that the signature on the lease was that of appellant.

At the conclusion of the hearing, the trial court found in favor of appellee. The written order entered on the day of trial granted appellee judgment in the amount of $35,200 for unpaid rent, $587.73 for unpaid utility bills, prejudgment interest in the amount of $7,216, and an attorney's fee of $3,520. The judgment also awarded post-judgment interest.

On April 28, 2008, appellant moved to set aside the judgment pursuant to Rules 55 and 60 of the Arkansas Rules of Civil Procedure. Appellant asserted that he had no actual or constructive notice of the trial setting and that he had a meritorious defense to the cause of action. In an affidavit, appellant stated that Dusek was his partner in a car business and that Dusek had defrauded him during the course of their business relationship. Appellant also claimed that Dusek signed appellant's name, or that Dusek had persons in appellant's office sign his name, to numerous documents of which he had no knowledge, "including many of the documents involved in this case." Appellant also stated that appellee had previously filed the same claim in another court and had taken a nonsuit. Appellant further stated, "I frankly thought that this matter was over, and that, like the last time, it would simply go away as Mr. Landers knows who is the real party and the real judgment creditor [sic] in this case."

Appellee responded to the motion to set aside by asserting that the January 8, 2008, letter he sent to Churchwell served as notice of the requested trial setting on March 31, 2008, in accordance with the trial court's procedure for setting non-jury trials.[2] Appellee argued that Churchwell's failure to notify appellant of the trial date prior to his withdrawal was not a sufficient ground to set aside the judgment. Appellee also asserted that appellant's own failure to ascertain the status of the case after the court relieved his attorney did not constitute a valid basis for setting aside the judgment. Appellee further argued that appellant had not demonstrated a meritorious defense.

The trial court denied appellant's motion to set aside the judgment without comment by an order dated May 16, 2008. Appellant filed a timely notice of appeal from this order on June 10, 2008.

Appellant argues on appeal that the trial court erred by not setting aside the judgment under Rule 55 or Rule 60(a) of the Arkansas Rules of Civil Procedure. He contends that neither appellee nor Churchwell notified him of the trial date, and he complains that Churchwell did not relinquish the case file to him when Churchwell was relieved as counsel. He further argues that he established a meritorious defense to appellee's cause of action as required by Rules 55 and 60.

We first note that Rule 55, which governs default judgments, is not applicable to this case. Appellant filed a timely answer to appellee's complaint, but he did not appear for trial.

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[2] Appellee attached a copy of the trial court's 2008 calender, which states "To set a case for trial on a regular day, write the Administrative Assistant at least 15 days in advance of the court date, and copy the respective clerk and the opposing counsel."

At trial, appellee presented evidence in support of his claim, and in the judgment, the trial court made findings of fact based on the testimony and evidence that appellee introduced. When a judgment is based upon evidence presented to the court at trial, as opposed to being based on the failure of a party to appear or attend, the judgment is not a default judgment, and Rule 55 does not apply. *Diebold v. Myers Gen. Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987). Although we recognize that the trial court used the term "default judgment," the court's characterization of the judgment is of no moment in that the court considered evidence and made factual determinations in rendering its decision. *See Harold v. Clark*, 316 Ark. 439, 872 S.W.2d 410 (1994); *Osborne v. Arkansas Dep't of Human Servs.*, 98 Ark. App. 129, 252 S.W.3d 138 (2007). We, therefore, reject appellant's arguments concerning Rule 55. The rule simply does not apply.

Appellant also argues that he was entitled to relief under Rule 60(a) to prevent a miscarriage of justice. This rule provides that "[t]o correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk." Rule 60(d) states that "[n]o judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense." The mere allegation of a meritorious defense is not sufficient. *Jetton v. Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978). A meritorious defense is evidence, not allegations, sufficient to justify the refusal to grant a directed verdict against the party required

to show a meritorious defense. *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991). In other words, it is not necessary to prove a defense, but merely to present sufficient evidence of a defense to justify a determination of the issue by a trier of fact. *Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987). Our question on appeal is whether the trial court abused its discretion by refusing to set aside the judgment. *See Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008).

In *Farmers Union Mut. Ins. Co.*, *supra*, the appellant sought to set aside a judgment under Rule 60 claiming that there was a miscarriage of justice because it received no notice of the trial date. We found no abuse of discretion in the trial court's decision denying the motion to set aside the judgment because the appellant failed to establish a meritorious defense. The same is true here. Appellant claims that Dusek defrauded him in the conduct of the car business, but nothing in this assertion absolves appellant of liability and his obligations under the lease. Appellant also alleges that Dusek signed his name or had others sign his name to documents, but appellant makes no specific assertion that the document in question here, the lease, was among the documents upon which his signature was forged. Appellant has thus failed to establish a meritorious defense, and we cannot say that the trial court abused its discretion in denying relief under Rule 60(a).

Affirmed.

PITTMAN and GLADWIN, JJ., agree.